BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBBIE R. TIPPIN	)	
Claimant	)	
VS.	)	
	)	Docket No. 204,191
SEDGWICK COUNTY	)	
Respondent,	)	
Self-Insured	)	

ORDER

Respondent appealed the November 30, 1999 Order entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on March 10, 2000.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for the claimant. E. L. Lee Kinch of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the January 13, 1998 Award that was entered in this claim. Additionally, the record includes the transcript from the hearing held before Judge Clark on November 30, 1999.

At oral argument before the Appeals Board, the parties stipulated that the November 30, 1999 Order should be treated as a final order as they did not intend to present any additional evidence. The parties also stipulated that all of the medical reports and records that were presented at the November 30, 1999 hearing should be considered as part of the evidentiary record despite the fact that the record's or report's author may not have testified. Further, the parties agreed that the memoranda that Mr. Kinch wrote following the September 2, 1999 meeting with the Judge and the September 10, 1999 telephone conference with the Judge could be considered as part of the record.

ISSUES

The Award dated January 13, 1998, granted claimant benefits for a July 6, 1995 accident and resulting back injury. The Appeals Board reviewed the Award and granted

claimant a 52 percent permanent partial general disability by its Order dated October 29, 1998. On July 8, 1999, claimant filed a request for additional medical treatment. While that request was pending, claimant proceeded with back surgery, which was prescribed by Dr. Alan R. Brewer, to have a permanent spinal cord stimulator implanted in his back. Following a hearing held on November 30, 1999, Judge Clark ordered the respondent to pay the medical expenses for the permanent spinal cord stimulator as authorized medical expense. That Order is the subject of this appeal.

Respondent contends Judge Clark erred. It argues that Dr. Robert L. Eyster was claimant's treating physician and, therefore, the medical treatment provided by or through Dr. Brewer was unauthorized. The respondent also argues that it should have been given the opportunity to provide claimant with the names of three physicians from which claimant would have chosen a new treating physician. Finally, respondent argues that the spinal cord stimulator implant was not necessary. For those reasons, respondent contends the November 30, 1999 Order should be reversed.

Conversely, claimant contends the Order should be affirmed. Claimant argues that the surgery was necessary to relieve the pain that he has suffered following two failed back surgeries. Additionally, claimant argues that Dr. Eyster was no longer treating claimant and, therefore, he was free to consult the physician of his choosing and have those bills paid by the respondent.

The only issue before the Appeals Board on this appeal is whether the medical bills for the permanent spinal cord stimulator should be paid by the respondent.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. As the result of a July 6, 1995 work-related accident, claimant underwent two back surgeries. By Order dated October 29, 1998, the Appeals Board awarded claimant a 52 percent permanent partial general disability.

2. Dr. Thomas W. Kneidel performed the first surgery, which addressed a herniated disc between the L5-S1 vertebrae. But claimant continued to have problems after that surgery, and in June 1996 Dr. Robert L. Eyster performed a two-level fusion from L4 to S1. Neither surgery was successful.

3. Dr. Eyster treated claimant through February 7, 1997. The doctor's office notes from that date read:

> Pt. has reached maximum medical L4-S1 fusion. Patient's x-rays show that the fusion mass appears to be developing and maturing. He has achieved relief of the slipping type feeling that he had that was present prior to the surgery. He has a drop foot or weakness or dorsiflexion of the foot and wears

> a brace. Pt. has some patella femoral instability of the knee. Pt. in my opinion has a 15% impairment rating to the body as a whole. He's going to be getting an FCE to see what his capabilities are. I'll see him prn.

According to claimant, Dr. Eyster told him that he was through treating him. Dr. Eyster was not deposed for purposes of this application and, therefore, did not controvert that testimony.

4. In early 1999, claimant's pain increased. Because of that pain, claimant increased the use of prescribed narcotic pain medications.

5. In February 1999, claimant sought treatment from his personal physician, Dr. Ruth Sherman. After trying different types of treatment, Dr. Sherman referred claimant to Dr. Alan R. Brewer, an anesthesiologist. Dr. Brewer diagnosed post-laminectomy syndrome with severe nerve damage secondary to the two back surgeries. After claimant benefitted from a temporary spinal dorsal column stimulator, Dr. Brewer recommended a permanent stimulator implant. In a July 6, 1999 medical report, Dr. Brewer wrote:

> Robby [sic] returns today after having undergone previous placement of a temporary dorsal column stimulator lead for relief of pain in his back and lower extremities. He has received excellent coverage of his pain in both his back as well as lower extremities and has decided to proceed on with a permanent placement of a dorsal column stimulator. He did develop a post-lumbar puncture headache after placement of his temporary placement stimulator and this has continued to cause him some distress. . . . Minor adjustments were required prior to removal of his stimulator in order for him to obtain coverage in his legs that would allow him to function at this time. He tolerated removal of his dorsal column stimulator lead quite well and is currently being scheduled for permanent placement of that lead. He will call on a p.r.n. basis prior to his next appointment.

6. When Dr. Brewer recommended a permanent spinal implant, claimant applied for review and modification of the Board's October 1998 Order requesting additional medical treatment. The initial hearing on that request was scheduled for September 2, 1999. A record was not made, but the Judge continued the hearing upon respondent's request to obtain a second opinion regarding the necessity of the procedure.

7. Respondent hired anesthesiologist Dr. James R. Hay to evaluate claimant. Dr. Hay saw claimant on September 10, 1999, and, according to claimant, advised that he would recommend the permanent stimulator.

8. On September 10, 1999, the day of claimant's appointment with Dr. Hay, the parties' attorneys held a telephone conference with the Judge. Because surgery was scheduled for the latter part of September, claimant's attorney requested a prompt hearing on the application for additional medical treatment so the matter could be decided before the

surgery took place. Respondent objected to having a hearing before it received Dr. Hay's report, and the Judge agreed.

9. For reasons that are not explained in the record, respondent's attorney did not receive Dr. Hay's report until September 28, 1999.[1] Contrary to claimant's belief that Dr. Hay would approve the procedure, the doctor did not recommend it as claimant allegedly did not report that it provided him enough relief. Dr. Hay's undated letter states:

> . . . Given my review of Mr. Tippin's records, I would certainly sustain the diagnostic impression of a post laminectomy syndrome based upon his surgical history and findings from [the] most recent MRI. I do believe that all conservative modalities to his treatment have been exhausted and I do agree with the consideration of spinal stimulator trial. However, given the patient's pain in the lower lumbar spine, a two lead trial would have been better to assess his benefit from spinal stimulation. Likewise, it is unfortunate that he sustained a dural puncture during the trial, as I think this did diminish the benefit that we could of [sic] documented from the trial he has undergone. In any event with a single lead trial and a benefit of 25-30% overall in his pain this does put him in a category that statistically would, in my opinion, not make him a good candidate for permanent implantation of a spinal cord stimulating system. Statistically folks in this range do not have a statistical probability of long term benefit (EG 5 and 10 year) in terms of satisfactory management of their pain with this modality. It is unfortunate that his trial was flawed, as well as unfortunate technically that one instead of two leads were [sic] used, as two leads during a trial can better capture "low back pain" and become more predictive of the patient's potential benefit from this technology.
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> In summary, Mr. Tippin represents as a 45-year-old gentleman with an unfortunate work related injury with subsequent surgical intervention complications stemming from that intervention. Spinal cord stimulation at lest [sic] given the patient's verbalized benefit does not warrant, in my opinion, permanent implantation of a system in Mr. Tippin at this time. . . .

Dr. Hay's report does not mention Dr. Brewer's opinion that claimant received an excellent result from the trial stimulator.

10. On September 28, 1999, once respondent's attorney received Dr. Hay's report, counsel immediately faxed a copy to claimant's attorney advising that claimant's request for the permanent spinal stimulator was being denied.

11. On September 29, 1999, claimant underwent surgery and had the permanent spinal stimulator implanted in his back and obtained significant relief. Claimant now requests the

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[1] Cf. K.S.A. 44-515.

medical bills for that surgery be paid by the respondent. Claimant does not request payment for the medical expense incurred before the September 29, 1999 surgery.

12. The record does not indicate that respondent, at any time before this appeal, raised the issue that Dr. Eyster was the authorized treating physician and that it was denied the opportunity to submit the names of three doctors from which claimant was to select a treating physician. According to respondent counsel's memoranda, respondent did not raise that argument to the Judge at either the September 2, 1999 meeting or in the September 10, 1999 telephone conference.

13. The record does not indicate that respondent advised claimant that Dr. Eyster was the authorized treating physician when it received various medical bills from Dr. Sherman's referrals in early 1999. The record does not indicate that respondent advised claimant that Dr. Eyster was the authorized treating physician when claimant applied for review and modification and additional medical treatment in July 1999. Likewise, the record fails to establish that respondent suggested that Dr. Eyster was the authorized treating physician when counsel met on September 2, 1999, and spoke on September 10, 1999. Finally, there is no evidence that Dr. Eyster was ever re-authorized to treat claimant after the initial Award was entered in this claim in January 1998.

14. The Appeals Board is persuaded that Dr. Eyster no longer wanted to see or treat claimant. Under the facts unique to this claim, the Appeals Board finds that Dr. Eyster was no longer providing claimant with active medical treatment and had released claimant from his care. Therefore, respondent was no longer providing medical treatment to claimant when he consulted Dr. Brewer about the spinal stimulator. Respondent's belated argument that Dr. Eyster remained claimant's authorized treating physician was an afterthought presented for the first time on this appeal and is not persuasive.

15. Claimant testified that the permanent spinal stimulator has significantly reduced the amount of narcotics that he takes for his pain and has improved his ability to function around the house. Considering that testimony, along with Dr. Brewer's medical records, the Appeals Board finds that the spinal stimulator implant was reasonably necessary to relieve claimant's symptoms of pain.

CONCLUSIONS OF LAW

1. The Order should be affirmed.

2. The Workers Compensation Act requires the employer to provide such medical services that may be reasonably necessary to cure and relieve an injured employee from the effects of an injury. The Act provides:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and

> apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, **as may be reasonably necessary to cure and relieve the employee from the effects of the injury.**[2] (Emphasis added.)

3. But if the employer refuses or neglects to provide medical treatment, the employee may obtain medical treatment and the employer is liable for that expense. The Act reads:

> . . . If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director. . . .[3]

4. As indicated above, the Appeals Board concludes that respondent was not providing claimant with medical treatment despite its knowledge that claimant was seeking additional treatment. Therefore, the respondent is responsible for paying the medical expenses for the September 29, 1999 surgery and any follow-up care. The Board does not condone claimant's actions in proceeding to surgery without first having permitted the Judge to decide whether the treatment was appropriate. But the Board recognizes that circumstances existed in this instance, at least in claimant's mind, which justified having the surgery on September 29, 1999.

5. Respondent's argument that it was denied the opportunity to provide claimant with the names of three physicians is misplaced. First, nothing prevented respondent from submitting claimant a list of three physicians before the September 29, 1999 surgery.

Second, respondent failed to present this issue to the Judge at either the September 2, 1999 hearing or September 10, 1999 telephone conference. The Act provides that the Appeals Board's review is limited to those questions of law and fact that were presented to the administrative law judge.[4] Because respondent did not present this issue or argument to the Judge, it should not be permitted to raise the issue for the first time on this appeal.

Third, the Appeals Board has held on numerous occasions that the provisions for submitting three doctors' names under the provisions for change of physician apply only to

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[2] K.S.A. 44-510(a).

[3] K.S.A. 44-510(b).

[4] K.S.A. 1999 Supp. 44-555c(a).

cases where the respondent is providing active medical treatment and where the claimant asks that the treatment be changed.[5] Those instances in which the respondent has refused or neglected to provide treatment are not "change of physician" situations as contemplated by K.S.A. 44-510(c). Instead, those instances are addressed by K.S.A. 44-510(b), which requires the employer to pay the expenses for any reasonably necessary medical treatment that the employee then obtains following an employer's neglect in providing treatment.

6. Based upon the parties' statements at oral argument, the Appeals Board finds that claimant should receive an additional $125 in attorney fees for the work associated with this appeal.

AWARD

WHEREFORE, the Appeals Board affirms the November 30, 1999 Order entered by Judge Clark. Additionally, the Board awards claimant's attorney an additional $125 for the services rendered on this appeal.

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
E. L. Lee Kinch, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

[5] See K.S.A. 44-510(c).